Sir ANDREW KENNEDY, *Bar.* } APPEL. | *The Queen's Majesty, and Sir* ALEXANDER CUMING, *Bar.* } RESP.

The Respondents CASE.

THE Office of Conservator of the *Scots* Privileges in the *Netherlands* is a very Ancient Office, held by Patent under the Great Seal of *Scotland*; to which several Powers and Faculties are committed in relation to Trade, Treaties with Foreign States, and other Matters that concern the Government and Publick Peace.

By many Ancient Treaties; and a Contract, now standing, made between the Royal Burroughs of *Scotland* (with the Approbation of his late Majesty King WILLIAM) of the one Part, and the States of *Zeland*, and Town of *Campvere*, of the other Part, *Anno* 1699; and by an express Act of Parliament in *Scotland*, *Campvere* is appointed the Port, where all Staple Goods, as Linnen and Woollen Manufacture, Hides, Skins, Butter, Oil, Tallow, Pork, Beef, Salmon, Lead-Ore, *&c.* of the Growth and Produce of *Scotland*, are to be landed. *Staple Contract An.* 1699.

By this Contract the *Scots* have many Privileges and Advantages, more than have been granted by any Neighbouring State, and far greater than the *Dutch* themselves enjoy. Among others, they are freed from all manner of Taxes, Customs, Duties, Excises and Impositions whatsoever on their Staple Goods imported (which in some is Ten or Twenty *per Cent.*) and on their Wines and Victuals consumed in their Ships and Families. And, by Article XIIIth of the said Contract, it is expressly provided, That the *Scots* only shall trade in the said Staple Goods, with Exclusion to the *Dutch* themselves, on Pain of Confiscation. And if any of the *Scots* cover their Trade, or negotiate for them, they are to be punished by the Conservator. And, by Article XXIII. of the said Contract, all Staple Goods, carried to any other Port than *Campvere*, are to be Confiscated, and the Transgressors punished by the Conservator without Connivence or Delay.

For the better maintaining these Privileges, and that the Conservator may have more ready Access to the States and their Senates Abroad, he is vested with the Character of a Publick Minister, *viz.* Resident for the whole Provinces; and hath full Jurisdiction both Civil and Criminal over *Scotch* Men. And, by several Acts of Parliament, he is obliged to keep Courts, and Administer Justice according to the Laws of *Scotland:* And those, who sue before any other Judicature, are Punishable. And, where Differences arise between *Scots* and *Dutch*, the Conservator is to appoint Arbitrators; and, if they make no Determination, he is to sit and judge with *Dutch* Magistrates. *Act* 81 *Par.* 6. *Ja.* 4. *Act* 96 *Par.* 6. *Ja.* 6.

The *Appellant Anno* 1689, obtained a Grant of the said Offices of Conservator and Resident for Life, under the Great Seal of *Scotland*; which was afterwards renewed to him and his Son *Anno* 1697, for the *Appellant*'s Life: But neither the *Appellant* nor his Son did ever qualify themselves to Act, upon that new Commission, by taking the Oaths required by Law. And the *Appellant* and his Son having greatly neglected their Duty and abused their Trust, Complaints were made against them from Time to Time by the States of *Zeland* and Town of *Campvere*, particularly in their Letters to the King; to the Duke of *Queensberry*, when Commissioner for the Parliament of *Scotland*; to the Earls of *Seafield* and *Cromarty*, Secretaries of State. Which being afterwards for just Reasons (and not at the Instigation of *Isaac Denheldt* as is without the least Proof falsly pretended by the *Appellant*, in whose favour he had renounced and given up his Jurisdiction, even in the Case of a *Scots* Factor) renewed *Anno* 1700, the late King was pleased to refer the said Complaints, to the Convention of R. Burroughs to make Enquiry thereunto, who having sent Commissioners for that Purpose to *Campvere*, and those Commissioners having made their Report to their Principals, whereby it appeared, that the *Appellant* and his Son had been guilty of very great Misdemeanors: Which

Report

Report being ratified by a new Committee of the Burroughs, and an Abſtract thereof made; and the Report being, by Her Majeſty's expreſs Command, laid before Her, to whom thoſe Complaints were repeated, She was pleaſed, by Her Warrant reciting the ſaid Proceedings, and that the *Appellant* and his Son had, by ſeveral Neglects and Miſdemeanors, forfeited their ſaid Offices, to order a Commiſſion to be paſſed under the Great Seal of *Scotland* for granting the ſaid Offices to Sir *Alexander Cuming*, the *Reſpondent*, for Life; thereby ordaining her Advocate and Solicitors to ſue all Actions neceſſary for making effectual the *Reſpondent*'s Grant, and annulling the *Appellant*'s. For the Legality of which Commiſſion, Twenty Three of the moſt Eminent Lawyers of that Kingdom gave their Opinions, with whom concurred the Queen's late and preſent Advocate; and their Opinions, atteſted by the Secretaries of State, were tranſmitted to Her Majeſty, before the *Reſpondent* had his Commiſſion. Which having afterwards paſſed the Great Seal, he entred upon his Office, and was received as Her Majeſty's Miniſter by the States-General and Town of *Campvere*.

Anno 1705, a Suit being brought in Her Majeſty's Name and the *Reſpondent*'s for affirming his Right; and the *Appellant* having likewiſe brought his Suit againſt Her Majeſty, the Officers of State, and the *Reſpondent* for aſſerting his own, and making void the *Reſpondent*'s Right. The Parliament being then ſitting, the Cauſe was remitted to be ſummarily determined by the Lords of Seſſion, before whom the *Appellant* was charged with Twenty Six Articles of Miſdemeanor in his Office. Among which were theſe following, *viz.*

Proved from Records at Home and Abroad. That, to extort a Sum of Money, he had miſrepreſented the R. Burroughs to the States in their Senate Abroad, by affirming, The Burroughs had made an Act, for allowing all Staple Goods to be landed at any other Port of the Provinces as well as *Campvere*, they paying Conſervator's Dues: Which ſo exaſperated the Town of *Campvere*, that, the next Day, they laid an Arreſt on all *Scots* Effects, which continued Ten Months, to the great Loſs and Diſhonour of the Nation.

Proved from Record. That, being intruſted by the R. Burroughs to ſign the Staple Contract, as recorded in their Books, and according to a Copy delivered to him, ſigned by the Provoſt of *Edinburgh*, he Signed a *Dutch* Copy, differing in Ten or Twelve Eſſential Articles, to the Prejudice of his Nation, for which he had Two Thouſand Ducatoons Reward.

Proved from Record and Witneſſes. That he had uſurped the Power of Queen and Parliament, by laying a Tax on all Merchant-Goods, particularly on all Sorts of Grain ſent to the *Netherlands*, and Liquors conſumed in the *Scots* Publick Houſe.

Proved from Record. That he had renounced his Juriſdiction in a very important Caſe of a *Scots* Factor, who was put to Twelve Hundred Pounds Charge in relieving himſelf, and getting the Matter remitted from the *Dutch* to the *Scotiſh* Judicature.

Proved by Witneſſes. That he had diſpenſed with the Breaches of the Staple Contract, and Acts of Parliament relating thereunto; and received Money on that Account.

Proved by Witneſſes and Record. That he was guilty of Oppreſſion in his Office, particularly in Arreſting the Effects of one *Arnold Ryex*, a *Dutch* Man, in *Scots* Factors Hands, without a Sentence, or ever commencing any Proceſs; by which *Ryex* loſt Thirty Thouſand Guilders, and was utterly Ruined. And, when the *Appellant* was ſentenced, by the High Courts of *Holland*, to take off the Arreſt, and make good the Damages, he protected himſelf as a publick Miniſter.

Proved by Witneſſes and Record. That he had affronted and diſobliged the States, where he reſided; and haraſſed and Impriſoned the Queen's Subjects upon ſlight and frivolous Pretences, for which ſeveral Decrees were pronounced againſt him by the Commiſſioners of Burroughs.

Proved by Witneſſes and Letters. That he had abuſed his Character, in appointing his own Menial Servant, and Factors Servants his Deputies; which the States and Town of *Campvere* complained of, in their Letters to the Burroughs, both as an Affront upon them, and Diſhonourable to the Queen and Nation, whom he repreſented.

Proved by Witneſſes. That, contrary to the III^d and XIII^th Article of the Staple Contract, made in the *Appellant*'s own Time, and an expreſs Act of Burroughs, *Anno* 1699, and his own ſigned Inſtructions, he had betrayed his Truſt, by allowing the Importation of *Iriſh* Goods belonging to *Dutch* Men, *&c.* and permitting the ſame (for a Gratification to himſelf) to be entred at the Staple Port, as *Scots* Goods, and thereby to enjoy the Immunity of Cuſtoms, *&c.* to the great Loſs of the Trade, Manufacture, and Native Produce of the Nation.

All which Miſdemeanors with many others, ſubverſive of the very End and Eſſence of the Conſervator's Office, being fully proved, by the laſt of which it appeared plainly, that the *Appellant* muſt of neceſſity be guilty of, or acceſſary to, the making uſe of falſe Names; counterfeiting Cocquets; bribing Cuſtom-Houſe Officers; breaking Five Acts of Parliament, *in relation*, to Cocquets, *concerning* the Owners of Staple Goods, *againſt* breaking of Bulk, *againſt* Prohibit Goods, *for* aſcertaining the

Acts 259, 260, 261, 262, *&* 264. *Par.* 15. *Fa.* 6. *in* 8°.

Payment

Payment of the Queen's Cuſtoms, *and for* bringing the Ships directly from *Scotland* to the Staple (all which the Maſters of Ships were obliged to ſwear upon, before the *Appellant* allowed them to make an Entry;) like as the Breach of Two Proclamations of Council, relating to the Staple, made during the *Appellant*'s Conſervatorſhip. Beſides the total Neglect of the Office, no Juriſdiction being exerciſed; no Courts kept; no Tranſgreſſors puniſhed; no Factors Qualify'd; no Juſtice adminiſtred betwixt Man and Man, the Firſt Four Years of the Queen's Reign; nor was Her Majeſty ever addreſſed, proclaimed, or Her Authority recogniſed in that Colony as was Cuſtomary; but all the Functions of the Office, both in relation to the Sovereign, to the Foreign State, to the Royal Burroughs, and the Nation, intirely neglected.

The *Appellant*, after delaying the Suit for above Two Years, finding all the Malverſations, charged upon him, clearly proved, did, to the *Reſpondent*'s great ſurpriſe, plead the Act of Indemnity in 1703, as appears in ſeveral Places of the Decree, tho' he would now untruly ſuggeſt the contrary. Againſt which tho' it was Objected for Her Majeſty, That the ſaid Act did not extend to pardon Offences, in Miniſters Abroad, committed againſt Foreign States, who, in this Caſe, were Plaintiffs, and ought not to be debarred of their Right, by the Law of Nations, of being freed of a Miniſter, whom they had complained of, in their Letters and Memorials, as *Negligent*, *Factious*, *Seditious*, *Turbulent*, and *Vexatious*. And tho' the ſaid Act might excuſe the *Appellant* from being puniſhed, it could not be extended to reſtore him to an Office which he had Forfeited; nor repone him to that Reputation, which was neceſſary for the Publick Service Abroad. Yet their Lordſhips were pleaſed to allow him the Benefit of the ſaid Act, as to all Miſdemeanors before the Date thereof. But there being ſeveral Miſdemeanors, committed by the *Appellant* after the ſaid Act, proved by Ten concurring Witneſſes, Six of which were Factors and paid him Dues, and diſcourſed him on the Subject, the Lords of Seſſion, upon hearing the ſaid Cauſe, made the following Decree, *viz.*

Decree 9° Dec. 1707.

'The Lords having conſidered the State of the Proceſs, and having adviſed the Debate above-written, with the Depoſitions of the Witneſſes, and Writs produced, they found it proven, That the *Appellant* did, ſince the Act of Indemnity, receive Conſervator-Dues for Staple Goods belonging to *Dutch* and *Iriſh* Men coming directly from *Ireland* to the Staple Port at *Campvere*, and that he was in the knowledge thereof: Which they found to be a Malverſation, in his Office of Conſervator, Sufficient for Deprivation. And therefore made void the *Appellant*'s Grant thereof; and Decreed the *Reſpondent*'s Right to the ſaid Office by virtue of his Commiſſion.'

That afterwards, upon the *Appellant*'s Petition, the ſaid Cauſe being re-heard, their Lordſhips were pleaſed to Affirm the ſaid Decree. *Jan. 16. 1709.*

Objection.

The *Appellant*, when the Cauſe was re-heard, and in a Second Petition, objected to the *Reſpondent*'s Commiſſion, and alledged, there was a Clauſe ſcored out by my Lord Chancellor in the Warrant, which made the Commiſſion, under the Great Seal, void; and the Words, *per ſaltum*, were added.

Anſwer.

It is anſwered, that the Clauſe delete was thought ſuperfluous; and Scored by the Chancellor in favour of the *Appellant*, that he might not be precluded from juſtifying himſelf, if he was Innocent.

There was no Objection upon this pretended Nullity, until after the Decree was pronounced, which could not then be received; nor would it have availed the *Appellant* at any time, he being Proſecute at the Queen's Suit.

As the *Reſpondent*'s Grant, under the Great Seal, was ſufficient; So he has a new Commiſſion ratifying and confirming the former in every Article, and conferring the Office *de novo*. And as to the pretended Addition of the Words *per ſaltum* in the Warrant, the ſame is falſe, as may appear by the Warrant it ſelf, and the Secretary's Docket.

The Lords rejected the Petition, and affirmed the Decree a Third and Fourth time. *Decree, pag. 392, 409. Jan. 29. 1708.*

From which ſaid Decree, the *Appellant*, after pleading the ſaid Act of Indemnity, hath thought fit to bring this Appeal before your Lordſhips, wherein ſeveral Things are untruly repreſented. But the *Reſpondent* humbly conceives, and is adviſed, that the ſaid Decree is conſonant to the Rules of Law and Juſtice; ſince there have been Grants of the ſame and other Offices upon Miſdemeanors of Perſons having them for Life, without any previous Sentence, or ſo much as an Inquiſition of ſuch Miſdemeanors or Proofs thereof from Record, as there was in this Caſe. And the *Appellant* being a Foreign Miniſter, and as ſuch having injured Foreign States, there was no need of a Formal Sentence before Iſſuing out of the Grant; the Proofs of his Miſdemeanors upon Record being ſufficient. And the Plaintiffs were not bound to wait Relief from the Decrees of Ordinary Judicatures, but had immediate Recourſe to the

Fountain

Fountain, Her Majeſty being in ſome meaſure anſwerable for his Behaviour, and ſo of Her ſelf capable to grant Redreſs, which was neceſſary for preſerving the Publick Peace, and preventing Repriſals, Embargo's and Arreſts, *&c.* Which are the common Remedies, where Juſtice is deny'd or delay'd Sovereign States.

And therefore the Reſpondent Humbly hopes, that your Lordſhips will be pleaſed to diſmiſs the ſaid Appeal with Coſts to Sir Alexander Cuming, *one of the Reſpondents.*

EDWARD NORTHEY.
ROBERT RAYMOND.

Indulgentia, Patres Conſcripti, quos liberat, notat; nec infamiam Criminis tollit, ſed Pœnæ gratiam facit. Lex 3. Cod. de generali Abolitione.

Sir ANDREW KENNEDY, *Bar.* } *Appel.*

The Queen's Majeſty, and Sir ALEXANDER CUMING, *Bar.* } *Reſp.*

The *Reſpondents* CASE.

To be Heard in the Houſe of Peers, 9th of *April*, 1718.